No. 86-944

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

EUGENE SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court effectively denied petitioner's compulsory process for obtaining witnesses in his favor by ruling that judicial character witnesses were cumulative.

2. Whether the court denied petitioner's right to due process by allowing him to be improperly cross-examined where his credibility was crucial.

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No.

In The

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October Term, 1986

EUGENE SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Eugene Sullivan respectfully prays to this Honorable Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which affirmed his judgment of conviction entered upon a jury verdict of guilty.

OPINION BELOW

The judgment order of the United States Court of Appeals

for the Third Circuit was entered on October 8, 1986, and is annexed hereto (Appendix, 1a). This petition for a writ of certiorari was filed within sixty days of that date.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an imparial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted by witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Procedural History

On November 26, 1985, petitioner was found guilty of 14 counts of a violation of the Hobbs Act and one count charging him with conspiracy. He was found not guilty of 15 other outstanding counts charging him with Hobbs Act violations.

On February 10, 1986, final judgment of sentence of 13 years

imprisonment and a $105,000 fine was imposed upon petitioner.

On October 8, 1986, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

B. Concise Statement of Facts

Petitioner is a 63 year old former Chief Inspector who served in the Philadelphia Police Department for 34 years. He was charged with commanding a division of the Philadelphia Police Department wherein various people made regular payments to members of his staff. Only two of eighteen government witnesses testified that they personally handed money to the petitioner and this only on isolated occasions.

Petitioner denied the allegations and testified on his own behalf regarding his attempts to enforce the vice laws within this particular division during the three years he was assigned there. The remaining witnesses testified only that they took or received money from racket figures in return for protection. No one testified that the petitioner ever indicated or asked them not to enforce vice laws.

The petitioner presented character testimony in his defense. In preparation for trial at least ten members of the Court of Common Pleas and the Municipal Court in Philadelphia indicated a willingness to testify as character witnesses for the petitioner if they were permitted to do so. These were people who had known the petitioner for many years, pre-dating their election to the bench and knew of his many acts of community service. None of them had served as judicial officers in matters involving the petitioner's testimony in their courts.

The Supreme Court of Pennsylvania requires permission to be sought before judges may testify as character witnesses. A

petition was filed before this court and was summarily denied with but one dissent on November 8, 1985.

In spite of this denial the District Court permitted the petitioner to issue subpoenas to the ten judges involved. However, following the issuance of the subpoenas the court required petitioner's counsel to call non-judicial character witnesses first and after 51 such persons appeared, ruled that the judicial character witnesses' testimony would be cumulative and refused to permit them to testify.

During cross-examination the prosecution questioned the petitioner about the accuracy of federal income tax forms and financial disclosure forms he had filed. Objection was promptly made that these were collateral matters but in spite of that, the government was permitted to elicit the fact that the petitioner had not reported income from the rental of propery he owned in a nearby New Jersey resort. He explained that he did not do so because the expenses of the property exceeded the income and, therefore, he had no "net income". Over strenuous and continuing objection the government was permitted to fashion this failure into admitted acts of untruthfulness upon the part of the petitioner.

An overview of the lack of evidence and the jury's verdict which found the petitioner not guilty of half of the charges indicates the importance of the petitioner's credibility in this case.

REASON FOR GRANTING THE WRIT

I.

The court, under the guise of directing the order of evidence and prohibiting cumulative testimony has denied the petitioner his right to call witnesses in his own behalf.

The supervisory power of any judicial system to regulate the appearance of judges as witnesses for the defendant has been focused upon with intensity in this decade. In this instance, the Supreme Court of Pennsylvania, without hearing any reasons why judicial character testimony should be allowed in this case, arbitrarily denied the petitioner of his right to call these witnesses. The District Court recognized the basic unfairness of this proceeding when it ruled that every defendant does, indeed, have a right to subpoena witnesses on his own behalf and order that the judges, nonetheless, be subpoenaed. Very shortly thereafter, however, the District Court, for the very first time in this trial, took upon itself to determine the order of witnesses in spite of strenuous objection from defense counsel.

Presentation of the government's case exceeded five full trial days. Presentation of the petitioner's 51 character witnesses and the presentation of the remaining ten judicial character witnesses would not have exceeded one morning session. The entire defense consumed less than a day and a half.

Petitioner made it quite clear to the District Court that he objected to the court's direction of the order in which he might present his character witnesses. There was absolutely nothing in the conduct of this trial or the conduct of the defense case which called upon the court to exercise any discretion as to how defense witnesses should be presented. Moreover, the court's determination that the judicial witnesses would be "cumulative" because they

would be asked the same question as other character witnesses is absurd when it is understood that all character witnesses must be asked the same general questions regarding their understanding of the defendant's reputation in the community.

It is respectfully submitted that the petitioner has carried his burden of showing that judicial character witnesses was material and favorable to his defense and would have been presented in his defense except for the order of the court. *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982). The Circuit Court's reliance upon the trial judges' discretion in controlling the admission of evidence cannot overcome this constitutional right.

II.

The court improperly applied Federal Rules of Evidence 611(b) and 608(b) and their own prior rulings in permitting the government to cross-examine the petitioner upon the content of his income tax returns.

The issue presented in the present case is the interpretation of "credibility". As this Court has previously held in *United States v. Able,* ____ U.S. ____, 105 S. Ct. 465 (1984), the government may cross-examine regarding membership in a group pledged to lie in order to show bias and motive to commit perjury on the part of the defendant.

The Third Circuit in *United States v. Pantone,* 609 F. 2d 675 (3rd Cir. 1979), properly applied the principles of *Walter v. United States,* 347 U.S. 62, 74 S. Ct. 354 (1954) in distinguishing between areas that had been specifically denied by defendant in his direct examination and those which had not. They noted at page 681:

> [W]e disapprove of the practice of using cross-

> examination beyond the scope of the direct testimony for the purpose of laying a foundation for the introduction, as rebuttal, of otherwise inadmissible evidence".

The present case does not involve an admission of untruthfulness on the part of a witness. His admission was only that he did not include gross income from the rental of seashore property because the expenses exceeded the income and, therefore, no tax was due. The government, however, was permitted to introduce this as some unspecified violation of the internal revenue laws and then to argue extensively to the jury that such a man would certainly be inclined to lie. The Circuit Court, in acceding to the discretion of the the trial judge, improperly characterized it as an issue of credibility and as such made it admissible under Federal Rules of Evidence 611(b) and 608(b). *United States v. Reed,* 700 F. 2d 638 (11th Cir. 1983); *United States v. Lamberty,* 778 F. 2d 59 (1st Cir. 1985); *United States v. Boroni,* 758 F. 2d 222 (7th Cir. 1985); *United States v. Alfonso,* 759 F. 2d 728 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons the petitioner Eugene Sullivan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

F. EMMETT FITZPATRICK
Attorney for Petitioner

APPENDIX A - OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1137

UNITED STATES OF AMERICA

v.

EUGENE SULLIVAN,
Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Criminal No. 85-00296-01

Argued September 19, 1986

Before: ADAMS, STAPLETON, and
VAN DUSEN, *Circuit Judges*

(Filed October 8, 1986)

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Attorney for Appellant

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Assistant United States Attorney
MICHAEL R. LAZERWITZ (Argued)
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Philadelphia, Pennsylvania
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Appendix A

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Eugene Sullivan appeals on various grounds from a decision of the District Court for the Eastern District of Pennsylvania finding him guilty of one count of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, and fourteen counts of specific violations of that Act. The violations in question occurred between March 1980 and September 1983, when Sullivan commanded the Northeast Divison of the Philadelphia Police Department. As division commander, Sullivan personally directed a vice lieutenant and an eight-member vice squad responsible for policing illegal gambling and prostitution within the division's boundaries. According to the jury, Sullivan headed a conspiracy among the members of the Northeast Division vice squad to extort money from owners and operators of illegal gambling and houses of prostitution in exchange for police protection.

I.

In March 1980 Sullivan assumed command of the Northeast Division. At Sullivan's request, Lt. Walter McDermott and Officer George Bowie were transferred to his vice squad from the Eastern Division. During their service in the Eastern Division, McDermott and Bowie had actively participated in an organized extortion scheme.

At trial, Bowie testified that the Northeast extortion ring was structured to insulate Sullivan, who supervised the operation. Bowie was the "chief bagman" for two years, routinely collecting at least $10,000 in cash each month from the various vice

operators who had agreed to pay for protection. Bowie reported each month's collection to McDermott, who divided up the proceeds: $4,000 for Sullivan, $2,000 for McDermott, $1,000 for Bowie, and $650 for each of the squad members. In 1982, Bowie and McDermott left the division, but their places were taken by Thomas Volkman, William Maahs and Lt. Bowman, and the extortion ring continued to operate until terminated by the federal investigation.

According to the testimony at trial, on a number of occasions Sullivan personally involved himself with screening vice operators for acceptance of protection money. On one occasion, Sullivan instructed Maahs to "leave [Lester Barry's] machines alone" when Sullivan realized that Barry had been making monthly protection payments to the squad. Moreover, Bowie testifed that the cash received from Robert Sadowl, the owner of one of the largest collections of illegal video poker machines in Philadelphia, was not "cut up with the squad" because it belonged "strictly" to Sullivan. This money from Sadowl alone ranged from $300 to $800 per month.

On August 8, 1985, a federal grand jury sitting in the Eastern District of Pennsylvania returned a 30-count indictment against Sullivan, as well as McDermott, Maahs, John Czman and Robert Schwartz, for violations of the Hobbs Act, 18 U.S.C. § 1951. After a jury trial, Sullivan was convicted of one count of conspiring to extort, and fourteen specific counts of extortion. He was sentenced to 15 concurrent terms of 13 years' imprisonment, and fines totalling $105,000 were imposed on him. The district court suspended execution of the sentence pending this appeal.

Sullivan now raises five objections to his conviction that merit discussion.

Appendix A

II.

A. *The District Court's Exclusion of the Ten State Court Judges as Character Witnesses*

Sullivan sought to call at trial some 61 character witnesses, including ten Pennsylvania state court judges, to attest to his reputation in the community. Rule 1701 of the Pennsylvania Rules of Judicial Administration requires judges to apply for permission from the State Supreme Court before appearing as character witnesses. In accordance with this rule, the judges in question filed a petition to appear on Sullivan's behalf, but the petition was denied by the Pennsylvania Supreme Court on November 8, 1985. In spite of this ruling the district court allowed Sullivan to issue subpoenas to the ten judges, declaring that the sixth amendment gives every defendant the right to subpoena anyone he chooses. At trial, however, the district court directed Sullivan to call all non-judicial character witnesses before calling any judicial character witnesses. In connection with this ruling, Judge Cahn gave the following guidance to Sullivan's counsel:

> I think I have to see how this goes. I want to see where your . . . examination is going to go. But we won't let the character witnesses go on, these are the broad guidelines. We certainly won't devote more than several hours to it at a maximum. Depending on the extent of the character testimony before we get to the Judges, we may not allow the Judges, because it would tend to be cumulative. I'll take an offer of proof from you as to what the Judges would add to what you already presented.

App. 1079a-1080a. Despite this suggestion, counsel called 51 non-judicial character witnesses before calling

the first judge. The district court then called for an offer of proof as to what the ten judicial witnesses would testify; counsel informed the court that each would be asked the same question regarding Sullivan's reputation for truth and veracity that had been addressed to the preceding witnesses. The court prohibited Sullivan from calling the judges on the ground that their testimony would be cumulative.

Sullivan contends that the district court abused its discretion in forcing the defense to present all non-judicial character witnesses first, and then excluding the judges' testimony as cumulative. Sullivan notes that the prosecution consumed at least five full days, while his character witnesses took up only one morning session, so that the judges' testimony would not have delayed unduly the proceedings. But in determining whether exclusion of testimony infringes the sixth amendment right to due process in the type situation we have here, the operative question is not how much time the testimony would consume, but whether the testimony would be cumulative. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). Sullivan provides no evidence to refute the district court's conclusion that the judges' testimony would have duplicated that of the 51 character witnesses allowed to appear. Instead, his counsel argues that the district court's order that non-judicial witnesses appear first, combined with its determination that the judges' testimony would be cumulative, had the effect of limiting his right to call relevant and favorable witnesses.

The Supreme Court has recognized, however, that the trial court has discretion as to the order in which parties adduce proof.

> The trial judge must meet situations as they arise and to do this must have broad power to cope with

> the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof: his determination will be reviewed only for abuse of discretion.

Geders v. U.S., 425 U.S. 80, 86 (1975). We cannot say that the district court abused its discretion in ordering that the non-judicial witnesses appear first. Because there has been no showing that the judges' testimony would have added anything of substance to the character endorsements already admitted by the district court, there was no abuse of discretion in determing that the testimony by the judges would be cumulative.

B. *The Sufficiency of the Evidence*

Sullivan argues that the prosecution did not elicit sufficient evidence to show that Sullivan knowingly joined the conspiracy, or that an overt act was committed in furtherance of the conspiracy. In reviewing the record for sufficiency, this Court must determine whether "there is substantial evidence viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Camiel*, 689 F.2d 31, 35-36 (3d Cir. 1982).

A careful review of the evidence set forth at trial shows that Sullivan's contention is without merit. There was sufficient evidence to conclude, for example: that Sullivan met with Robert Sadowi, a video poker machine kingpin, and personally arranged cash payoffs in exchange for protection from Sullivan's vice squad; that Sullivan personally approved the entry of other vice operators, such as Arnold Arnovitz, Daniel Buckley, and John Catagnus, into the squad's extortion ring; that on another occasion, Sullivan

approved the squad's returning confiscated video poker machines to their owner, Alan Simons, in exchange for Simons's agreeing to pay protection payoffs in the future; that Sullivan made certain that video poker machines belonging to his friend John Kellis were protected; that Sullivan not only accepted cash payoffs from Kellis, but also directed two of his vice officers, Thomas Volkmar and John Czmar, to take steps to ensure that Kellis's machines were not confiscated; and that Sullivan received monthly cash shares of up to $4,000.00 for his overseeing the extortion operation.

C. *Admission of Testimony Concerning Prior Tax Returns and Disclosure Forms*

During cross-examination, the prosecution questioned Sullivan about the accuracy of federal income tax forms and financial disclosure forms he had filed. Sullivan maintains that these matters were collateral matters not raised during direct examination, and therefore inadmissible as evidence.

In the federal courts, the scope of cross-examination permitted is set forth in Federal Rule of Evidence 611(b): "Cross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness.*" (emphasis added). Similarly, Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness. . . .

Appendix A

The government contends that Sullivan's fraudulent replies on the forms in question were probative of his truthfulness and therefore admissible. *See United States v. Zandi*, 769 F.2d 229, 236 (4th Cir. 1985) (failure to disclose income on income tax and financial forms probative of truthfulness and admissible); *Carter v. Hewitt*, 617 F.2d 961 (3d Cir. 1980) (where witness concedes alleged acts, they can be used to impeach credibility in cross-examination, even if otherwise extrinsic). As the prosecution points out, Sullivan's direct testimony presented the issue of his credibility to the jury. Sullivan's credibility was in fact the central issue litigated in the case, as the defense presented only Sullivan and the character witnesses during its portion of the trial. The defendant was prepared to stand or fall on the credibility of his own testimony, as supported by character witnesses. Thus it was not error for the district court to allow the prosecution to attack Sullivan's credibility.

D. *The Prosecution's Comment Concerning the Northeast Division Arrest Book and Sullivan's Financial Records*

During the trial, one of Sullivan's co-defendants elicited testimony concerning the date of certain arrests from a bound Northeast Division arrest book. Although only one page from the book was referred to in testimony, the entire book was admitted into evidence without objection. The prosecution also subpoenaed certain financial records of Sullivan. Sullivan stipulated to the authenticity of these records, and was cross-examined about some of them, but no other testimony was heard about them. In its rebuttal, the prosecution referred to both the arrest book and the financial records, and Sullivan's counsel objected for the first time.

Sullivan claims that admission of the arrest book and the other records without any testimony regarding them was error, compounded by references to both the arrest book and the other records in closing argument. But Sullivan cites no authority to support his proposition. He did not object to the admission of the arrest book into evidence until after the book was referred to by the prosecution in its closing argument, so that he has no standing to challenge its admission here. Not only were the financial records in question stipulated to be authentic, but they were introduced after Sullivan answered questions about them during cross-examination. Therefore, Sullivan's objection "that those things have never been referred to by anybody" is mistaken. Once a piece of evidence has been properly admitted, reference to it cannot be error, because the prosecution may "ask the jury to draw permissible inferences from anything that appears in the record." *Oliver v. Zimmerman*, 720 F.2d 766, 770 (3d Cir. 1983) (*per curiam*), *cert. denied*, 465 U.S. 1033 (1984).

E. *The Jury Instructions on Extortion*

In its instructions to the jury, the district court stated that extortion may be established by the receipt of money under color of office. In doing so, it rejected Sullivan's request for an instruction that extortion can be based only on a finding that property was obtained from another whose consent was induced by wrongful use of actual or threatened force, violence of fear. Sullivan contends that the trial court erred in failing to give this instruction, and in giving the instruction on receipt of money under color of office.

As Sullivan concedes, however, the rule for extortion is not as set forth in his suggested instructions, but as in the court's actual instructions.

In this Circuit, extortion may be established by the receipt of money under color of office. *United States v. Jannotti*, 673 F.2d 578, 594-96 (3d Cir. 1982). This Court pointed out in *Jannotti* that a requirement of force, threats or use of fear to distinguish extortion from bribery is not required where public officials are involved. Such a distinction is "not in keeping with the legislative intent" in passing the Hobbs Act. *Jannotti* 673 F.2d at 595.

III.

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

No. 86-944

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SUPPLEMENTAL APPENDIX

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APPENDIX B—BENCH OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Commencing at page 2]

(Call to Order of the Court).

THE COURT: I want to deliver a bench opinion in this case. I think it's better to decide these things when—right after the argument when all the arguments are fresh in my mind, and the closer a case is decided to the time of trial makes it easier for the trial court to recollect what happened at the trial. I reserve the right to correct errors in spelling, grammar or syntax, and to add citations and footnotes in the event of an appeal.

BENCH OPINION

I. *FACTS*

Eugene Sullivan, a former chief inspector of the Philadelphia Police Department, and four other former policemen were named in a thirty count indictment, charging the named persons with violations of the Hobbs Act, 18 U.S.C. Section 1951, including conspiracy and substantive offenses. Two of the policemen, John Czmar and William Maahs, pleaded guilty to the various charges against them. Strike that. I want to read that sentence again. Two of the policemen, John Czmar and William Maahs, pleaded guilty to some of the charges against them. (Pause). We were right the first time. We'll go back and read it for a third time, and this is the way I want it typed in the opinion. Two of the policemen, John Czmar and William Maahs, pleaded guilty to the various charges against them. In November 1985, a trial was held [3] for the three remaining defendants. At the trial, gambling and video poker machine operators testified concerning monthly protection

payoffs. These payoffs, which amounted to ten to fifteen thousand dollars per month, were made to members of the vice squads of the East and Northeast Police Divisions. Five former policemen testified about their personal involvement in this extortion scheme.

In his defense, Mr. Sullivan took the stand and denied all of the charges against him. Also, the defendant called over fifty witnesses who testified to his good character. The jury found Mr. Sullivan guilty of conspiracy and fourteen substantive Hobbs Act violations. Defendants Walter McDermott and Robert Schwartz were also found guilty of numerous violations of the Hobbs Act.

Defendant Sullivan has requested post trial relief from his convictions based on four alleged errors committed by the trial court. After reviewing the briefs submitted and listening to today's oral argument, I find that no errors were committed by the Court in the course of the three week trial. Therefore, for the following reasons I deny post trial relief to the defendant.

II. *JUDGES AS CHARACTER WITNESSES*

First, the defendant argues that the Court prohibited the defense from calling as character witnesses ten Pennsylvania state court judges. Specifically, Mr. Sullivan's [4] lawyer objected to my order that he first call all of the non-judicial character witnesses. Defense counsel also objected when I, after evaluating all of the character testimony on behalf of Mr. Sullivan, ruled that the judges should not be called because their testimony would be cumulative. In his brief, the defendant also argues that Pennsylvania Judicial Administration Rule 1701 is unconstitutional. The rule requires the prior approval of the Pennsylvania Supreme Court for any state judge who wishes to testify as a character witness. The defense counsel alleges that

the Supreme Court's denial of permission for those judges to testify in this case limited the defendant's ability to present a competent and effective defense and is therefore unconstitutional.

The question of allowing judges to testify as character witnesses in a trial is a sensitive issue. Civil Rule 9 of the Local Rules of the Eastern District of Pennsylvania limits the subpoenaing of federal judges as character witnesses to certain specific situations where the judge's testimony would not be cumulative and an order prohibiting the testimony would prejudice the petitioner. The Pennsylvania state rule is similar to this local rule. Opinion 15 of the American Bar Association Committee on Professional Ethics provides more guidance on how a judge should determine whether to testify as a character witness. Although Opinion 15 agrees that there is nothing in the [5] Canons of Judicial Ethics to prevent a judge from testifying as a character witness, it notes that a judge who does testify necessarily gives the defense the weight of his judicial position and dignity. A judge "should consider . . . the propriety of testifying and determine whether his testimony is necessary and appropriate to give a fair trial to the accused, or is merely an attempt of the defense to throw into the scales the weight of his judicial position." *See also* Advisory Opinion #9, *Code of Judicial Conduct for United States Judges.* These various authorities highlight possible problems which could arise if a judge were allowed to testify as a character witness.

To determine the importance to the defendant of these judges as character witnesses, I instructed defense counsel to call his non-judicial character witnesses first. My decision to do this is well within the boundaries of the discretion of the trial judge. As the Supreme Court stated in *Geders,* G-E-D-E-R-S, *versus United States,* 425 U.S. 80 (1976):

Appendix B

> The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion.

[6] *Geders*, G-E-D-E-R-S, 425 U.S. at 87. *See also U.S. versus Continental Group, Inc.*, 456 F.Supp. 704 (E.D. Pa 1978) (allowing co-conspirator's statements into testimony before ruling was made as to admissibility); *U.S. v. Cylkowski*, 556 F.2d 799, 802 (6th Cir. 1977). Therefore, no error was committed by requiring the defense to present his witnesses in a particular order.

The Court of Appeals for the Third Circuit has held that district court judges have wide discretion in limiting the number of defense witnesses called to the stand. *See U.S. v. Somers*, S-O-M-E-R-S, 496 F.2d 723, 735-36 (3d Circuit 1974); *U.S. v. Baysek*, B-A-Y-S-E-K, 212 F.2d 446 (3d Circuit 1954); (Judge can limit character witnesses after seven have testified). Because of the seriousness of the crimes to which the defendant has been indicted and the importance of the credibility of the parties involved, I allowed the defense to call 25 witnesses to testify to Mr. Sullivan's good character. Another 26 persons were allowed to come forward to acknowledge the defendant's good character. Among the witnesses who testified were a priest, a state senator, some high ranking police officers and several attorneys.

After the 51 witnesses gave their testimony, I evaluated all of the character evidence that was admitted on behalf of Mr. Sullivan. I concluded that more than a sufficient amount of evidence had been given and that any more similar evidence would

be cumulative. Relying on the *Baysek* [7] precedent and Rule 403 of the Federal Rules of Evidence, I prohibited any more character witnesses from testifying. At this point in the trial, preventing the judges from testifying did not harm Mr. Sullivan's defense. The testimony already admitted into evidence tended to show Mr. Sullivan's character to be outstanding and nothing would have been added by more testimony. Furthermore, by not allowing the judges to testify, I eliminated the problems that might arise whenever a judge takes the witness stand as a character witness.

The defense counsel's argument concerning the constitutionality of the Pennsylvania rule has little bearing on this case. Although the Pennsylvania Supreme Court denied permission for the judges to testify, I nevertheless ordered that subpoenas could be issued to summon these judges. On the record, I explicitly found that the Pennsylvania rule is not binding on th federal courts and I acted accordingly. Therefore, it is unnecessary to discuss the constitutionality of a state rule which had almost no bearing on my decision to prohibit the state judges from testifying. In conclusion, all of the Court's actions in regard to this issue were within the trial judge's discretion. On review of this issue, I find no reason to grant any relief to the defendant because no error was committed by the Court.

III. *SUFFICIENT INDEPENDENT EVIDENCE OF CONSPIRACY*

The defendant urges that the trial court erred [8] when it determined that sufficient independent proof of a conspiracy existed to link Eugene Sullivan to the conspiracy and to allow the admission of co-conspirators' statements in the case. The defendant's arguments are without merit. It is undisputed that an extortion conspiracy existed. I found more than sufficient

evidence to link Mr. Sullivan to this conspiracy.

Without reviewing every witness and every aspect of the case, it is clear that sufficient evidence existed to conclude by a preponderance of the evidence that Mr. Sullivan was part of the conspiracy. The former police officers involved in the extortion scheme testified to various conversations with Sullivan which either identified him as a participant or raised reasonable inferences that he was involved in the scheme. John Czmar testified that he personally gave Eugene Sullivan approximately thirty-five hundred dollars per month as Sullivan's share of the payoffs. Video poker machine vendors testified that they had gone to Sullivan's office to arrange protection payoffs and Sullivan had referred them to the vice lieutenant, who then arranged for payment. Considered in the aggregate, this evidence is sufficient to support my finding that a single conspiracy existed and that Sullivan was a part of it. Similarly, this same evidence is more than adequate to support my ruling which allowed the admission of the statements of co-conspirators. Thus I was [9] justified in finding that there was sufficient evidence to conclude that Eugene Sullivan was part of the extortion conspiracy.

IV. *USE OF TAX RETURNS AND DISCLOSURE STATEMENTS TO CROSS-EXAMINE DEFENDANT*

Next, the defendant argues that it was improper for the Court to allow the prosecution to question Mr. Sullivan about his tax returns and disclosure statements during cross-examination. The defense counsel reasons that since Mr. Sullivan was not examined on direct examination—I want to change that sentence. The defense counsel reasons that since Mr. Sullivan was not questioned on direct examination about the accuracy of his tax returns, it was an improper subject for any cross-examination. Citing *U.S.*

versus Dennis, 725 F.2d 782 (8th Circuit 1980), defense counsel also claims that tax problems are not indicative of a lack of truthfulness.

Rule 608(b) of the Federal Rules of Evidence provides that:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness [10] or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, . . .

This rule has been interpreted to mean that an examiner may ask the witness a question but he is forced to take the witness's answer. The cross-examiner is not allowed to bring other evidence or witnesses to discredit that testimony. *See Carter v. Hewitt,* 617 F.2d 961, 969 (3d Circuit 1980); 3 J. Weinstein & M. Berger, Weinstein's Evidence, Section 608(05), at 608-22 (1978). However, when evidence is obtained from the very witness whose credibility is under attack, the evidentiary rule's core concerns are not violated. *See Carter,* 617 F.2d at 970.

In the case at hand, it seems clear that the Government prosecutors were entitled to question Mr. Sullivan about his tax returns. Because a person is required to sign his tax returns under the penalty of perjury, they are probative of a person's truthfulness. *See U.S. v. Zandi,* Z-A-N-D-I, 769 F.2d 229, 236 (4th Circuit 1985). Since the major issue in this case was the credibility of the various witnesses who testified, including Mr.

Sullivan, questioning Mr. Sullivan about his tax returns is permissible under Rule 608(b). The Court explicitly warned the prosecution not to present any extrinsic tax return evidence nor to display the returns to the jury. The prosecutors followed these [11] instructions and merely questioned the defendant about various aspects of his tax return.

Defendant suggests that the cross-examination was more prejudicial than probative under Federal Rule of Evidence 403. In my view, the probative value is not "substantially outweighed" by possible prejudice, especially in light of the defendant's plausible explanation.

V. *THE NORTHEAST ARREST BOOK*

Finally, the defense argues that the prosecution's utilization of the Northeast arrest book in its closing rebuttable was improper. The defendant claims that the book was admitted into evidence for a very limited purpose and could not be used in the manner in which it was used. Although I have not reviewed the transcripts of the book's admission into evidence, my notes and recollection reflect that the Northeast arrest book was admitted without objection. The defendant has provided no authority to substantiate his claim that evidence can be used only for the limited purpose for which it was originally used at trial. Also, the defendant was given ample warning to anticipate the prosecution's use of the book in its closing. Defendant's attorney neither referred to this book in his closing nor did he take any other steps available to him to limit the use of the exhibit. I conclude that it was not error to allow the Government to refer to the arrest book in their closing rebuttal. In any [12] event, any error in this regard would appear to be harmless.

Appendix B

In conclusion, I find that no reversible errors were committed by the Court during the three week trial. Mr. Sullivan received a fair trial and his lawyer was able to present a competent and effective defense. I find that the jury verdict should stand and that no relief should be granted to the defendant. An appropriate order will be entered.

Mr. Klein, will you prepare an order which denies the post trial motions filed by Mr. Fitzpatrick, and when do you want to have sentencing for the defendant?

MR. KLEIN: Your Honor, I will prepare the order. The Government is prepared to sentence at whatever time is appropriate to the Court. I understand that the sentence of McDermott and Schwartz has been scheduled for February 24th. If the Court wants to do them jointly, we could do it then; if the Court wants to do it separately, perhaps the following week.

THE COURT: How about March 3rd?

MR. KLEIN: That's fine with the Government, Your Honor.

THE COURT: Is it the 24th for Schwartz and McDermott?

MR. KLEIN: Yes, it is.

THE COURT: How about March 3rd, Mr. Fitzpatrick?

[13] MR. FITZPATRICK: I think that's all right, sir. I don't have another commitment that I know of, except for Judge McGlynn on March 10th.

THE COURT: All right. Then if you would have

sentencing—I just want to check with my secretary to make sure that March 3rd is a good day. (Pause). We can make it 9:30 in courtroom 3B in this courthouse.

MR. KLEIN: Very well.

THE COURT: Monday, March 3rd.

MR. KLEIN: Thank you, Your Honor.

THE COURT: Prepare an order; put this sentencing date in the order. Has a presentence report been prepared?

MR. KLEIN: I understand it has, Your Honor.

THE COURT: Okay.

MR. KLEIN: We would ask one thing, that we'd be able to have access to the financial portion of that as soon as possible so that we can compare—that is Mr. Sullivan's financial data that was submitted. We would like to look at that.

THE COURT: I have no objection if you have access. Is there any problem?

MR. KLEIN: All right. Because we asked the probation officer. He said to go through the Court. So I'm just bringing it up.

THE COURT: Yes, you may have access to it. [14] Speak to Mr. Gershenfeld. He'll see that you get it.

MR. KLEIN: Thank you.

Appendix B

MR. FITZPATRICK: I've recently received an order from Mr. Gooch in another matter which indicates that it's now the practice in this District to mail you copies of the presentence report. Is that true in this case?

THE COURT: That's being implemented, yes. I'm not sure . . .

MR. FITZPATRICK: Well then can I assume that I will receive a copy?

THE COURT: You better check with Mr. Gooch's office . . .

MR. FITZPATRICK: Very good, sir.

THE COURT: . . . to avoid the similar kind of problems we had with regard to the transcript.

MR. FITZPATRICK: Very good, sir.

THE COURT: Anything else?

MR. KLEIN: The Government has nothing further, Your Honor.

MR. FITZPATRICK: May we be excused?

THE COURT: All right. You may be excused. This Court stands in recess until 2:00.

MR. KLEIN: Thank you, Your Honor.